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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 301.

LEO W. McCRAY, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

FILED JUNE 1, 1903.

(18,952.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JUNE 19, 1903.

1 THE UNITED STATES OF AMERICA, } ss:
Southern District of Ohio, Western Division, }

At a stated term of the district court of the United States of America, within and for the western division of the southern district of Ohio, in the sixth judicial circuit of the United States of America, begun and had in the court rooms in the city of Cincinnati, Ohio, in said district, on the first Tuesday of April being the seventh day of that month, in the year of our Lord one thousand nine hundred and three and of the American Independence the one hundred and twenty-seventh.

Present: The Honorable Albert C. Thompson, district judge.

Among the proceedings had were the following, to wit:

THE UNITED STATES OF AMERICA }
vs. } No. 1810. For Money.
LEO W. McCRAY. }

Be it remembered, that heretofore, to-wit, came the plaintiff by its attorneys and filed in the clerk's office of said court its certain petition herein against the defendant Leo W. McCray—said petition is clothed in the words and figures following, to-wit:

Petition.

United States District Court, Southern District of Ohio, Western Division.

THE UNITED STATES OF AMERICA }
vs. } No. 1810.
LEO W. McCRAY. }

Now comes The United States, by William E. Bundy, United States attorney for the southern district of Ohio, and for its
2 cause of action says that on the twenty-fourth day of October 1902, the said defendant Leo W. McCray, was a retail dealer in oleomargerine, in the city of Cincinnati, southern district of Ohio, within the meaning of section 3, of the act of Congress of the United States of America, entitled "An act defining butter, also imposing a tax upon and regulating the manufacture, importation and exportation of oleomargerine," approved August 2, 1886, and the amendments thereto approved May 9, 1902. That said defendant had theretofore on the twenty-fifth day of July 1902, paid to the collector of internal revenue for the first collection district of Ohio, at his office in said city of Cincinnati, in the district aforesaid, the special tax of six dollars imposed and required of retail dealers of oleomargerine, by the provisions of section 3, of the act of August 2, 1886, as amended by section 2, of the act of May 9, 1902.

That said defendant did on said first mentioned date, to-wit, Oc-

tober 22, knowingly purchase and receive for sale in the course of his business, twenty pounds of oleomargerine, which said oleomargerine was purchased and received by said defendant from the Ohio Butterine Company, a corporation organized under and by virtue of the laws of West Virginia, and doing business as manufacturers of oleomargerine at Cincinnati, in said State, within the meaning of said act of Congress, as amended, and by which corporation said oleomargerine had been manufactured and prepared for sale in the course of its business.

3 Plaintiff further says that said oleomargerine so purchased and received for sale by said defendant as aforesaid, had not been stamped according to law, and which said defendant then and there well knew, ain that said oleomargerine, so manufactured, as aforesaid by the Ohio Butterine Company, was not free from artificial coloration and did contain additional coloring matter that caused it to look like butter of a certain share of yellow, and in violation of the provisions of section 8, of the act of August 2, 1886, as amended by section 3, of the act of May 9, 1902, had only been stamped by affixing internal revenue stamps of the value and at the rate of one fourth of one cent per pound, whereas the same should have been stamped according to law by affixing thereto internal revenue stamps of the value and at the rate of ten cents per pound; and said defendant became and is liable by reason of the premises, to a penalty of fifty dollars ($50.00) for such offense, under and by virtue of the provisions of section 11, of the act of August 2, 1886, as amended by section 3, of the act of May 9, 1902 and for which sum plaintiff prays judgment against said defendant, and for costs.

WILLIAM E. BUNDY,
Attorney for the United States.

STATE OF OHIO, }
Hamilton County, } *ss:*

William E. Bundy, being first duly sworn, says that he is the United States attorney for the southern district of Ohio, and that the facts stated in the foregoing petition are true, as he verily believes.

WILLIAM E. BUNDY.

Sworn to before me and subscribed in my presence this 27th day of October A. D. 1902.

[SEAL.] CLIFFORD WOODS,
Notary Public in and for Hamilton County, Ohio.

40c. due notary.

4 And afterwards, to-wit, on the 1st day of November A. D. 1902 an answer was filed in the clerk's office of said court, clothed in the words and figures following, to-wit:

Answer.

United States District Court, Southern District of Ohio, Western Division.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
LEO C. McCRAY, Defendant. } Answer.

Comes now the defendant, Leo C. McCray, and for answer to plaintiff's petition filed against him herein says:

First. He admits that on the 24th day of October 1902, he was a retail dealer in oleomargerine in the city of Cincinnati, in the southern district of Ohio, within the meaning of section 3, of the act of Congress, entitled "An act defining butter, also imposing a tax upon and regulating the manufacture, importation and exportation of oleomargerine," approved August 2, 1886, and the amendments thereto, approved May 9, 1902.

He admits that on the 25th day of July 1902, he paid to the collector of internal revenue for the first collection district of
5 Ohio, at his office in said city of Cincinnati, in the district aforesaid, the special tax of six dollars imposed and required of retail dealers in oleomargerine, by the provisions of section 3 of the act of August 2, 1886, as amended by section 2 of the act of May 9, 1902.

He admits that on the day alleged in the petition, to-wit, October 24th 1902, he purchased and received for sale in the course of his business 20 pounds of oleomargerine He admits that said oleomargerine was purchased and received by him from the Ohio Butterine Company, a corporation organized under and by virtue of the laws of West Virginia, and that said corpora-ion is now, and upon the date stated, was doing business as manufacturers of oleomargerine at Cincinnati, in the State of Ohio, within the meaning of the said act as amended, and that said corporation manufactured and prepared said oleomargerine for sale in the course of its business.

Defendant admits that said 20 pounds of oleomargerine so purchased and received by him from the Ohio Butterine Company, corporation as aforesaid, was of a certain shade of yellow color, and that said 20 pounds of oleomargerine had been stamped by affixing internal revenue stamps thereto of the value and at the rate on one fourth of one cent per pound; of all of which said defendant had full knowledge at the time.

And further answering, defendant denies each and every other allegation in said petition contained not herein specifically admitted.

6 *First Defense.*

Defendant says, that on the 24th day of October, 1902, being a retail dealer in oleomargerine as alleged in plaintiff's petition and hereinbefore admitted, and having paid the tax of six dollars im-

posed and required as hereinbefore alleged and admitted, he did, with full knowledge of the facts in relating thereto, purchase and receive for sale in the course of his business, and at his place of business in the city of Cincinnati, a package containing 20 pounds of oleomargerine from the said The Ohio Butterine Company, corporation as aforesaid; that said oleomargerine had been manufactured, compounded and prepared for sale by said corporation from a formula used by it, in the course of its business, and known as "high grade" and contained the following ingredients in the proportions given, and none other, that is to say; oleo oil, 20 pounds; neutral lard, 30 pounds; creamery butter, fifty pounds; milk and cream, 30 pounds; common salt, 7 pounds; that said oleomargerine, though containing only the ingredients named, was of a yellow color; that said yellow color in said finished article of oleomargerine was imparted to it by the use, employment and introduction in the manufacture thereof, as one of the constituent, elementary and necessary ingredients and parts thereof, of said 50 pounds of creamery butter; that said creamery butter was purchased in the open market and was the food product usually known as butter and which is made exclusively from milk or cream or both, as defined in section 1 of the act of Congress of August 2, 1886, to-wit "That for the purpose of this act the word "butter" shall be understood to mean the food product usually known as butter, and which is made exclusively from milk or cream, or both, with or without common salt, and with or without coloring matter;" that said creamery butter so purchased and used in the manufacture of said oleomargarine was of a rich yellow color; that said color was derived from the use as an ingredient in its manufacture, of a substance known as Wells-Richardson's improved butter color, a substance universally used in the United States in the manufacture of butter, for the purpose of imparting a deep yellow color; that the same is neither injurious nor harmful for human consumption; that no additional or other coloring matter of any kind whatever was used or introduced into the finished product of oleomargarine by the said The Ohio Butterine Company; that the oleomargarine so purchased and received by the defendant was wholesome and nutritious, and free from any deleterious or injurious ingredient.

Defendant further says that the said The Ohio Butterine Company, manufacturers of said package of oleomargarine, from whom said package was purchased and received as aforesaid, had paid the special tax imposed and required by the acts of Congress relating to butter and oleomargarine and had otherwise conducted its business in compliance with all the requirements of said acts; that said package so purchased and received by the defendant as aforesaid had been packed, marked, stamped, branded and labeled, in compliance with all the provisions of said acts and with all the regulations thereunder prescribed by the Commissioner of Internal Revenue and the Secretary of the Treasury.

8 Defendant admits that said package of oleomargarine at the time he so purchased and received it, had been stamped by affixing internal revenue stamps thereto of the value and at the rate of one-fourth of a cent per pound, but denies that the same was not stamped according to law, or otherwise in violation of the provisions of section 8 of the act of August 2, 1886, as amended by section 3 of the act of May 9, 1902.

Defendant had full knowledge of the character and condition of said package of oleomargarine both as to the ingredients it contained and the amount of tax paid thereon.

Defendant further says that the cost of manufacture of the wholesale and nutritious oleomargarine like that contained in said package is such that it cannot be sold in competition with butter if the tax of ten cents per pound be imposed and paid.

The color of high grade oleomargarine manufactured as aforesaid, by the use and introduction of said creamery butter as one of the essential and necessary ingredients in the manufacture thereof, was of a light shade of yellow and not of the same deep yellow color possessed by said creamery butter. The natural color of butter at the time of the alleged offense, was of a lighter shade of yellow than that made in the spring season and nearly white, and of a lighter shade than the taste of butter consumers in the United States de-

9 mands. The butter of trade and commerce is artificially colored by the use of said Wells-Richardson's butter color or other similar substance in order to impart a deeper shade of yellow. There is little demand in the United States for either butter or oleomargarine which is not of the deep yellow shade of said spring butter.

Second Defense.

For a second defense to the petition this defendant says that the act of Congress relating to butter and oleomargarine of August 2, 1886, as amended by the act of Congress of May 9, 1902, in so far as it imposes a tax of ten cents per pound upon oleomargarine containing "artificial coloration that causes it to look like butter of any shade of yellow," and in so far as it authorizes the Commissioner of Internal Revenue "to decide what substances, extracts, mixtures or compounds which may be submitted for his inspection in contested cases are to be taxed under this act," and provides that "his decision in the matter of taxation under this act shall be final," is in contravention of the Constitution of the United States and of the amendments thereto and is illegal and void, for the following reasons, to-wit:

(1.) The act deprives the defendant of his property without due process of law.

(2.) The act is an unwarranted encroachment upon and in-

10 terference with the police powers reserved to the several States and to the people of the United States.

(3.) The act invests an inferior executive officer with the power

finally and arbitrarily to determine an essentially judicial question concerning vast property rights.

(4.) The act so arbitrarily discriminates against oleomargarine in favor of butter as to destroy the oleomargarine industry for the benefit of the butter industry in the United States, and is thus repugnant to those fundamental principles of equality and justice which are inherent in the Constitution of the United States.

Wherefore, the defendant, having fully answered, prays to be hence dismissed with his costs herein expended.

FORAKER, OUTCALT, GRANGER & PRIOR,
Attorneys for Defendant.

UNITED STATES OF AMERICA, }
State of Ohio, Hamilton County, } *ss:*

Leo W. McCray being first duly sworn says he is the defendant above named, and that the facts stated and allegations made in the foregoing answer, are true as he verily believes.

LEO W. McCRAY.

Sworn to before me and subscribed in my presence this 31st day of October 1902.

[SEAL.] W. A. RINCKHOFF,
Notary Public, Hamilton County, Ohio.

40c. due notary.

11 And afterwards, to-wit, on the 16th day of January A. D. 1903 a demurrer was filed in the clerk's office of said court, clothed in the words and figures following, to-wit:

Demurrer.

United States District Court, Southern District of Ohio, Western Division.

THE UNITED STATES OF AMERICA, Plaintiff, }
vs. } No. 1810. Demurrer.
LEO W. MCCRAY, Defendant. }

Now comes the United States of America, by William E. Bundy, United States attorney for the southern district of Ohio, and demurs to the "first defense" as set out in the answer of the defendant, for the reason that said defense does not state facts sufficient in law to constitute a defense.

And now comes the United States of America, by William E. Bundy, United States attorney for the southern district of Ohio, and demurs to the "second defense" set out in the answer of defendant, for the reason that it does not state facts sufficient in law to constitute a defense.

WILLIAM E. BUNDY,
U. S. Attorney, S. D. O.

12 And afterwards, to-wit, on the 18th day of May A. D. 1903 an entry was made upon the journal of said court, clothed in the words and figures following, to-wit:

Journal 8, page 382.

This cause coming on to be heard upon the demurrer of the United States of America, to the answer of defendant, and upon the arguments of counsel the court doth find that said demurrer is well taken, and doth hereby sustain said demurrer.

And it appearing to the court that the defendant does not wish to plead further, the court doth find that the allegations of the petition of plaintiff are true, doth find that plaintiff is therefore entitled to judgment against defendant for a penalty of $50.00 and the costs of this action.

Wherefore, it is ordered and adjudged that plaintiff recover of defendant said sum of $50.00, as penalty and the costs of this action, taxed at $—.

To all of which ruling of the court, and judgment hereby rendered, the defendant doth except.

And afterwards, to-wit on the 21st day of May A. D. 1903, a petition for writ of error was filed in the clerk's office of said court, clothed in the words and figures following, to-wit.

Petition for Writ of Error.

13 In the District Court of the United States for the Southern District of Ohio, Western Division.

THE UNITED STATES OF AMERICA, Plaintiff, vs. LEO W. MCCRAY, Defendant.	No. 1810. Petition for Writ of Error.

And now comes Leo W. McCray, defendant herein, and says that on or about the 13th day of May 1903, this court entered judgment herein in favor of the plaintiff and against this defendant, in which judgment and the proceedings had prior thereunto in this cause certain errors were committed, to the prejudice of this defendant, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, this defendant prays that a writ of error may issue in this behalf to the United States Supreme Court, for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Supreme Court.

MILLER OUTCALT,
C. E. PRIOR,
Attorneys for Defendant.

And afterwards, to-wit, on the 21st day of May A. D. 1903, the following assignment of errors was filed in the clerk's office of said court, clothed in words and figures following, to-wit—

Assignment of Errors.

14 In the District Court of the United States for the Southern District of Ohio, Western Division.

No. 1810.

THE UNITED STATES OF AMERICA, Plaintiff, vs. LEO McCRAY, Defendant. | No. 1810. Assignment of Errors.

The defendant in this action in connection with his petition for a writ of error, makes the following assignment of errors which he avers occurred upon the trial of the cause, to-wit:

1. The court erred in sustaining the demurrer of the plaintiff to the answer of the defendant filed herein as appears of record herein.

11. The act of Congress approved August 2nd, 1886, entitled "An act defining butter, also imposing a tax upon and regulating the manufacture, sale, importation and exportation of oleomargarine," as amended by the act of Congress, approved May 9th, 1902, entitled "An act to make oleomargarine and other imitation dairy products subject to the laws of any State or Territory or the District of Columbia into which they are transported, and to change the tax on oleomargarine, and to impose a tax, provide for the inspection, and regulate the manufacture and sale of certain dairy products,

15 and to amend an act entitled 'An act defining butter, also imposing a tax upon and regulating the manufacture, sale, importation and exportation of oleomargarine,' approved August 2nd, 1886," under which this action is instituted and prosecuted, is in contravention of the Constitution of the United States of America and of the amendments thereto, and is illegal and void for the following reasons, to-wit:

(*a*) The act deprives the defendant of his property without due process of law;

(*b*) The act is an unwarranted encroachment upon and an interference with the police powers reserved to the several States and to the people of the United States;

(*c*) The act so arbitrarily discriminates against oleomargarine in favor of butter as to destroy the oleomargarine industry for the benefit of the butter industry in the United States, and is thus repugnant to those fundamental principles of equality and justice which are inherent in the Constitution of the United States.

III. If said act be not in contravention of the Constitution of the United States of America, then said court erred in holding that oleomargarine which contains no other artificial coloration than

that imparted to it by the use of butter which itself contains coloring matter and which therefore causes said oleomargarine to look like butter of a shade of yellow, is subject to a tax of ten cents per pound instead of a tax of one-fourth of one cent per pound.

IV. The court erred in entering judgment in favor of the plaintiff and against this defendant.

MILLER OUTCALT,
C. E. PRIOR,
Att'ys for Def't.

16 And afterwards, to-wit, on the 20th day of May A. D. 1903, the following entry was made upon the journal of said court, clothed in the words and figures following, to-wit.

J. 8, page 383.

THE UNITED STATES OF AMERICA
vs.
LEO W. McCRAY.

This day came the defendant and presented his petition for the allowance of a writ of error, and an assignment of errors ac-company-ing the same, which petition upon consideration of the court is hereby allowed, and the court allows a writ of error to the U. S. Supreme Court upon the filing of a bond in the sum of $250.00, with good and sufficient security to be approved by the court.

17 And afterwards, to-wit, 22nd day of Ma- A. D. 1903, a bond was filed in the clerk's office of said court, clothed in the words and figures following, to-wit:

Bond.

District Court of the United States, Southern District of Ohio, Western Division.

THE UNITED STATES
vs.
LEO W. McCRAY.

Know all men by these presents: That we, Leo W. McCray, as principal and the American Bonding Company of Baltimore, as surety, are held and firmly bound unto the United States of America, in the sum of two hundred and fifty dollars to be paid to the said The United States of America. To which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors and administrators, firmly by these presents.

Sealed with our seals. Dated this 22nd day of May 1903.

Whereas, the above named Leo W. McCray, has taken out a writ of error to the Supreme Court of the United States of America to

reverse the judgment rendered in the above entitled action by the district court of the United States for the southern district of Ohio, western division.

Now therefore, the condition of this obligation is such, that if the above named Leo W. McCray shall prosecute his said writ of error to effect and answer all costs if he shall fail to make good his
18 plea, then this obligation to be void; otherwise to remain in full force and virtue.

LEO W. McCRAY, [SEAL.]
AMERICAN BONDING COMPANY OF BALTIMORE,
By JOHN DOYLE, *Vice Pres't.* [SEAL.]
Attest: THORPE MILES, *Assistant Sec'y.*

Sealed and delivered in presence of—
ALFRED FAHRENBRUCK.
D. F. JAUNLD.

The above security is approved.

A. C. THOMPSON,
District Judge of the United States, S. D. O.

19 THE UNITED STATES OF AMERICA, }
Southern District of Ohio, Western Division, } *ss:*

I, Benjamin R. Cowen, clerk of the district court of the United States of America, within and for the division and district aforesaid, do hereby certify that the foregoing is a full, true and correct transcript of the proceedings had by and before said court and as the same appears of record and on file in the clerk's office of said court, and further certify that no opinion was filed by the court.

Seal United States District Court, Southern Dis. Ohio.

In witness whereof, I have hereunto set my hand and affixed the seal of said court at the city of Cincinnati, Ohio, this 23rd day of May A. D. 1903.

B. R. COWEN, *Clerk,*
By JAMES W. F. COWEN,
Deputy Clerk.

20 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judge of the district court of the United States for the southern district of Ohio, Greeting:

Because in the records and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between The United States of America and Leo W. McCray a manifest error hath happened to the great damage of the said Leo W. McCray as by his complaint appears. We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command

you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at the city of Washington within thirty days from this date in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 23d day of May, 1903, in the year of our Lord one thousand nine hundred and three.

[Seal United States District Court, Southern Dis. Ohio.]

B. R. COWEN,
Clerk of the Circuit Court of the U. S., S. D. O.

[Endorsed:] United States district court, southern district of Ohio W. D. No. 1018. The United States of America *vs.* Leo W. McCray. Writ of error. Filed May 23 1903. B. R. Cowen, clerk.

21 THE UNITED STATES OF AMERICA, *ss:*

To the United States of America, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington, within thirty days from this date *of*, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the southern district of Ohio, wherein Leo W. McCray is plaintiff, and you are defendant, in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice be done to the parties in that behalf.

Witness, the Honorable Albert C. Thompson, district judge of the United States, this 23" day of May in the year of our Lord one thousand nine hundred and three.

A. C. THOMPSON,
Judge U. S. District Court, Southern District of Ohio.

22 [Endorsed:] Marshal's criminal docket No. 2398 United States district court, southern district of Ohio W. D. No. 1018 The United States of America *vs.* Leo W. McCray. Citation to defendant in error. Filed May 25 1903 B. R. Cowen clerk. Error bond filed.

CINCINNATI, OHIO, *May* 25, 1903.

Received this writ on the 25th day of May 1903, and on the same day served the within named The United States of America by handing a true copy of this writ, with all the endorsements thereon to William E. Bundy, United States attorney for the southern district of Ohio, at Cincinnati.

Fees.

Copy	50
Service	2.00
	$2.50

V. F. FAGIN,
U. S. Marshal, S. D. O.

23 [Endorsed:] No. 1810. United States district court, southern district of Ohio, western division. Leo W. McCray *vs.* The United States of America. Transcript. —— ——, attorneys.

Endorsed on cover: File No. 18,952. S. Ohio D. C. U. S. Term No. 301. Leo W. McCray, plaintiff in error, *vs.* The United States. Filed June 1st, 1903.